

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

February 19, 2015

Elisabeth A. Shumaker
Clerk of Court

MARLIN BAER,

Plaintiff - Appellant,

v.

SALT LAKE CITY CORPORATION;
LARRY BOWERS; GENO GARCIA;
TENNO NAVAREZ; DON HUNSAKER;
IENA SWANKE,

Defendants - Appellees,

and

COUNTY OF SALT LAKE; JEFFERY
SEIGAL; TRENTON HEINTZ,

Defendants.

No. 14-4153
(D.C. No. 2:13-CV-00336-CW-PMW)

ORDER

Before **BRISCOE**, Chief Judge, **LUCERO**, and **PHILLIPS**, Circuit Judges.

Appellant Marlin Baer seeks to appeal the dismissal of his claims against the Salt Lake City Corporation, Larry Bowers, Geno Garcia, Rosendo “Teno” Nevarez, Don Hunsaker, and Faifuaina “Ina” Schwenke-Tauiliili (the “City Defendants”) for failure to state a claim. Mr. Baer’s claims against several other defendants remain pending in the district court. We consider *sua sponte* whether we have jurisdiction to consider this appeal.

Generally, our jurisdiction is limited to review of final decisions. 28 U.S.C. § 1291. An order or other decision that adjudicates fewer than all claims, or the rights and liabilities of fewer than all parties, is not a final decision unless the district court certifies the order as final in accordance with Federal Rule of Civil Procedure 54(b). *See* Fed. R. Civ. P. 54(b).

To satisfy Rule 54(b)'s requirements, a district court must make two express determinations. *Oklahoma Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1242 (10th Cir. 2001). “First, the district court must determine that the order it is certifying is a final order.” *Id.* “Second, the district court must determine that there is no just reason to delay review of the final order.” *Id.* Incorporating by reference the arguments and conclusions contained in a motion seeking certification does not satisfy Rule 54(b)'s requirements. *Stockman's Water Co., LLC v. Vaca Partners, LP*, 425 F.3d 1263, 1266 (10th Cir. 2005); *see also Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1279 (10th Cir. 2013) (declining to consider the motion seeking Rule 54(b) certification in conjunction with the district court's certification order to determine whether the district court had made the requisite findings). We have held that the district court must set forth, “albeit briefly,” its reasons supporting a determination of finality and no just reason for delay in its certification order, or the order will not be sufficient to provide us with appellate jurisdiction. *Stockman's Water*, 425 F.3d at 1266 (dismissing for lack of jurisdiction because the district court did not make the necessary findings in its certification order).

In this case, a magistrate judge recommended that the district court grant the City Defendants' motion to dismiss, and the district court adopted that recommendation on

April 25, 2014. Mr. Baer subsequently filed several motions asking the court to reconsider its April 25 order and the City Defendants filed a motion to certify the April 25 order as final pursuant to Rule 54(b). On September 11, 2014, the district court denied Mr. Baer's motions to reconsider and granted the City Defendants' motion to certify. In doing so, the district court quoted the text of Rule 54(b) and then stated,

For the reasons stated in the City Defendants' Motion and Memorandum, and for good cause shown therein, the Court hereby GRANTS the motion, and certifies its Order Adopting Report and Recommendation on April 25, 2014 (Dkt. No. 63) as a final judgment with respect to the Court's Order dismissing Plaintiff's claims against the City Defendants.

On December 1, 2014, Mr. Baer filed a notice of appeal from the district court's September 11 order certifying the dismissal of the City Defendants as final. We note that even if the district court had issued a proper Rule 54(b) certification, Mr. Baer's appeal would have been untimely and we would lack appellate jurisdiction for that reason. *See* Fed. R. App. P. 4(a)(1)(A) (providing that a notice of appeal must be filed within 30 days after entry of the judgment appealed from). However, the district court's certification did not satisfy Rule 54(b)'s requirements. The district court did not set forth its own reasoning nor did it make an express determination that there was no just reason to delay review of the April 25 order.

In accordance with the practice adopted by this court in *Lewis v. B.F. Goodrich, Co.*, 850 F.2d 641, 645 (10th Cir. 1988), upon opening this appeal, the court notified Mr. Baer of the apparent jurisdictional defect occasioned by the insufficient Rule 54(b) certification and directed Mr. Baer to obtain a proper Rule 54(b) certification from the district court or a final judgment adjudicating all remaining claims. Mr. Baer filed a

response to the court's order and the court extended Mr. Baer's deadline for obtaining a proper Rule 54(b) certification until February 9, 2015.

Mr. Baer has filed another response asking the court to abate this appeal until February of 2016, which is when trial is set on his claims against the remaining defendants. In the meantime, Mr. Baer indicates he will request a proper Rule 54(b) certification from the district court. *Lewis* does not allow for a lengthy abatement of a premature appeal while the parties continue to litigate in district court. 850 F.2d at 645-46 (indicating that "if no certification, or final, dispositive adjudication, is obtained and presented to this appellate court by the specified date, the case will be dismissed summarily for lack of appellate jurisdiction"). Absent a proper Rule 54(b) certification, we are without jurisdiction and must dismiss, but our determination that the district court's Rule 54(b) certification was insufficient to confer jurisdiction on this court at this time does not preclude Mr. Baer from filing a timely appeal following entry of final judgment.

Mr. Baer has not remedied the jurisdictional defect within the time set by the court. Accordingly, this appeal is dismissed for lack of jurisdiction.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

A handwritten signature in cursive script, appearing to read "Jane K. Castro", with a long horizontal flourish extending to the right.

by: Jane K. Castro
Counsel to the Clerk